In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
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No. 73-906

L. N. PATTERSON, et al.,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

BERNARD C. VUN CANNON,
Real Party in Interest.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners' Reply to Respondent's Brief in Opposition

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PRELIMINARY STATEMENT

In opposing the petition for Writ of Certiorari, Vun Cannon, the real party in interest, asserts in his "Statement" (Brief at 2-3) that his refusal to answer the interrogatories in question was based not only on the privilege against self-incrimination but also on the "ground that since furnishing such answers would place his life in immediate and grave danger of reprisals from other inmates, the

court should afford protection from undue burden under Rule 26(c)." Vun Cannon then further asserts that the district court did not reach the Rule 26 claim because the court agreed that the privilege was applicable. While this is accurate, it is incomplete. In connection with Interrogatory No. 17 which Vun Cannon refused to answer on the same two grounds, the Court concluded that there was no danger of self-incrimination and ordered him to answer the question. The Court then determined the Rule 26 claim, and issued a protective order sealing the answer. *See* Appendix to Petition at 5. It seems apparent that the same ruling would apply to the interrogatories at issue here.

Vun Cannon then makes two arguments in opposition to the petition:

1) That under the circumstances of this case, mandamus was not a proper remedy in the Court of Appeal (Brief at 3); and 2) that where a plaintiff refuses to answer interrogatories seeking information which is privileged under Rule 26, a trial court has no authority to dismiss the complaint or to impose other sanctions for such refusal (Brief at 8). We respond briefly to each argument.

ARGUMENT

I

Mandamus Is a Proper Remedy

The real party in interest quotes this Court in *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) for the proposition that the writ is not to be used as a substitute for appeal even though hardship may result, but is appropriately issued when there is usurpation of judicial power or a clear abuse of discretion (Brief at 4). It is petitioners' contention that such a clear abuse of discretion exists in this case: the district court erroneously permitted the assertion of the privi-

lege against self-incrimination, an interpretation of "privilege" which, we assert, is totally erroneous.

In an effort to demonstrate that there has been no prejudical impact as to petitioners, Vun Cannon states that petitioners did not raise in the lower courts and have asserted for the first time in this petition that they have been denied access to facts which are "basic to the cause of action" or "on which his cause of action is based." (Brief at 4-5; 5 n. 1.) Thus, he urges that it is inappropriate for this Court to consider the issue.

Vun Cannon is mistaken. The precise issue raised in the petition was raised in both the district court and the Court of Appeal. In the district court, petitioners stated: "Plaintiff's allegation that he was threatened that the defendants knew it and deliberately set up plaintiff so the known would be killers would have access to him is the entire gravamen of his complaint." (Motion to Compel Answers or in the Alternative to Dismiss the Complaint and Motion to Strike Allegations of the Complaint, filed December 20, 1972, at p. 5); "The questions plaintiff has refused to answer concern allegations central and basic to his claim." *Id.* at 7. In the Court of Appeal, petitioners stated: "Plaintiff's allegation that he was threatened, that the defendants knew it and deliberately set up plaintiff so the known would be killer would have access to him is the entire gravamen of his complaint." (Petition for Writ of Mandamus and/or Prohibition, filed on July 24, 1973, at p. 4); "The allegations of the complaint to which the interrogatories relate are basic to the cause of action" *Id.* at 8. Thus, we cannot conceive of the basis for Vun Cannon's assertion that the issue was not raised.

Vun Cannon then makes the further assertion that the contention that these allegations are "basic" to his cause of action is untrue (Brief at 5). We invite this Court's atten-

tion to Vun Cannon's Brief in this Court at page 2, where he states that petitioners have argued that under *Williams v. Field,* 416 F.2d 483 (9th Cir. 1969) liability is precluded unless Vun Cannon is able to show a bad faith motive or intentional misconduct. In his complaint, this "bad faith motive" was alleged to include summary punishment of Vun Cannon because of "his refusal to attack a black inmate." *See* Appendix to Petition at 13.

Vun Cannon's additional arguments that the harm to petitioners is minimal because they can get the information from other sources (Brief at 6) and that a ruling in petitioners favor would not determine the issue of Vun Cannon's liability to answer the questions because of the court's failure to rule on his second ground are unpersuasive. As to the first, the harm to petitioners cannot be assessed, but it is obvious that plaintiff is the only one who can really respond to the issue of whether he was threatened and who threatened him. As to the second, the court ruled on the second ground in connection with Interrogatory No. 17, as pointed out in the preliminary Statement, *supra.*

Finally, Vun Cannon urges that the District Court's ruling is not "either fundamental in nature or wide-ranging in scope." (Brief at 7.) We disagree. The question raised by the petition as to the interpretation of "privilege" under the federal rules of discovery is one of first impression in this Court; one which has resulted in conflicting opinions in the federal courts,[1] and one on which standard texts take opposite positions.[2] Such a case is an appropriate one for review

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1. *Compare Lyons v. Johnson,* 415 F.2d 540 (9th Cir. 1969) *cert. denied,* 397 U.S. 1027 and *Brown v. Ames,* 346 F.Supp. 1176 (D. Minn. 1972) *with Alioto v. Holtzman,* 320 F.Supp. 256 (E.D. Wisc. 1970).

2. *Compare* 4 Moore's Federal Practice ¶ 26.60 [6] (Second Edition 1972) *with* 8 Wright & Miller, Federal Practice and Procedure § 2018 (1970).

by mandate and by this Court. *Cf. Schlagenhauf v. Holder, supra,* at 110-111.

II

The Question at Issue Is Not Whether Sanctions Can Be Imposed for Properly Invoking a Privilege But Whether the Court Properly Permitted Assertion of the Privilege.

Vun Cannon states that petitioners have "conceded" that discovery cannot reach information protected by the privilege against self-incrimination, that Vun Cannon properly invoked the privilege and that Rule 37 does not authorize sanctions against a party who refuses discovery with respect to privileged information (Brief at 8). Vun Cannon has overlooked the entire thrust of petitioners' argument: The information requested is *not* privileged because any privilege which might have existed has been waived.

In making the allegations at issue here, Vun Cannon has put himself in the same position as a criminal defendant who testifies. Once he does so, he waives his privilege and cannot thereafter assert it to prevent cross-examination. This Court has stated that "privilege" is to be interpreted as it is in the rules of evidence governing trials. *See U.S. v. Reynolds,* 345 U.S. 1, 6 (1953). A party who testifies is subject to cross-examination. By simple analogy, a party who makes allegations can be questioned concerning them.

Vun Cannon relies on the views expressed in 8 Wright and Miller § 2018, (*See* Brief at 9), that it is "inconceivable that by exercising his constitutional right to bring or defend an action a person waives his constitutional right not to be a witness against himself." We suggest that the authors' argument for this proposition, if applied to allegations of the complaint, is unsupported by logic and based on faulty analogies. Moreover the result reached is both totally incon-

sistent with the policy underlying discovery and egregiously unfair.[3]

Finally, Vun Cannon asserts that petitioners are seeking mandamus to compel the court to "depart from well settled principles of constitutional law in favor of a novel theory." What petitioners are seeking is their right to "cross-examine" the plaintiff as to assertions made in a complaint against which they must defend themselves. Vun Cannon is attempting to achieve a benefit for himself by bringing the action and making the allegations. Simple fairness requires that he must be held to his waiver, or forego the allegations or action as appropriate.

CONCLUSION

Because this is such an important and unresolved question in the interpretation of the federal rules, and because of its impact on the ever increasing number of prisoners civil rights actions, we respectfully urge that the petition for Writ of Certiorari be granted.

Dated: January 30, 1974

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3. Vun Cannon also cites this Court's opinion in *Schlagenhauf v. Holder, supra.* (*See* Brief at 9-10; n. 5.) This Court was interpreting Rule 35, and did not reach the waiver question raised in this case.